

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

SERGIO SANCHEZ FAJARDO, } CV 13-08718-SH  
Plaintiff, } MEMORANDUM DECISION  
v. } AND ORDER  
CAROLYN W. COLVIN, Commissioner, }  
Social Security Administration, }  
Defendant. }

21 This matter is before the Court for review of the decision by  
22 Commissioner of Social Security denying plaintiff's application for a period of  
23 disability and Disability Insurance Benefits. Pursuant to 28 U.S.C § 636(c), the  
24 parties have consented that the case may be handled by the undersigned. The  
25 action arises under 42 U.S.C § 405(g), which authorizes the Court to enter  
26 judgment upon the pleadings and transcript of the record before the  
27 Commissioner. The plaintiff and the defendant have filed their pleadings  
28 (Plaintiff's Reply; Defendant's Brief in Support of Answer; Plaintiff's Opening

1 Brief) and the defendant has filed the certified transcript of record. After  
2 reviewing the matter, the Court concludes that the Decision of the Commissioner  
3 should be reversed and remanded.

4 On January 28, 2010, plaintiff Sergio Fajardo filed an application for a  
5 period of disability and Disability Insurance Benefits, alleging an inability to  
6 work since February 23, 2008. (See Administrative Record [“AR”] 106-112).  
7 On March 14, 2011, after being denied initially and upon reconsideration,  
8 plaintiff requested a hearing on his claim. (AR 76). Following a hearing on May  
9 7, 2012 (see AR 35-54), the Administrative Law Judge (“ALJ”) issued an  
10 unfavorable Decision on June 17, 2012. (See AR 21-30). The ALJ determined  
11 that plaintiff had several severe impairments -- right shoulder and elbow injuries  
12 post right shoulder arthroscopic repair of rotator cuff tear and subacromial  
13 decompression, right ulnar nerve transposition, and depressive disorder;  
14 however, the ALJ found plaintiff was not disabled. (See AR 23-26, 30).

15 This became the final decision of the Commissioner of Social Security  
16 when the Appeals Council denied review. (See AR 1-8). Plaintiff then  
17 commenced this action for judicial review pursuant to 42 U.S.C § 405(g).

18 Although plaintiff characterizes his claim as one claim, plaintiff actually is  
19 making two challenges to the ALJ’s Decision. Plaintiff alleges the ALJ erred in:  
20 (1) asking an insufficient hypothetical question to the vocational expert by  
21 failing to include plaintiff’s language barrier, and (2) failing to consider  
22 plaintiff’s age.

23 For the reason discussed below, the Court finds that plaintiff’s first claim  
24 of error has merit. Since the case will be remanded for further proceedings  
25 regarding plaintiff’s first claim of error, the Court will not address plaintiff’s  
26 second claim of error.

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## **DISCUSSION**

## **ISSUE NO: 1**

Plaintiff asserts that the ALJ erred by posing to the vocational expert (“VE”) a hypothetical question that did not properly reflect plaintiff’s English language barrier. Defendant contends that this error was harmless because the vocational expert stated on cross-examination that the inability to communicate in English would not interfere with the jobs available to plaintiff in the national economy.<sup>1</sup>

At the administrative hearing, the ALJ asked the VE a hypothetical question with the following limitations: “a 49-year-old with a six grade education” and with several physical limitations. AR 48. When the VE asked for clarification regarding the hypothetical person’s ability to communicate in English, the ALJ responded, “[He] cannot speak English but [can] communicate in English”. (AR 49). The Court finds that statement incomprehensible. The VE then testified that the hypothetical person could perform the occupations of fast food worker (DOT 311.472-010), laundry worker (DOT 302.685-010), bench hand assembler of small parts (DOT 715.684-026), and escort vehicle driver (DOT 919.663-022). Id.

During cross-examination of the VE, plaintiff's counsel clarified the hypothetical question by stating the limitation that the "individual cannot communicate in English." (AR 50). Focusing on the physical limitations, rather than on the language limitation, the VE stated that plaintiff could not perform the laundry worker job. (AR 51-52). The ALJ then commented that with these

<sup>1</sup> Social Security claims are evaluated according to a five-step sequential analysis. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998). At step five, the ALJ bears the burden to establish that, even though the plaintiff cannot return to his or her prior type of work, there are other jobs that exist in substantial numbers in the national economy that the plaintiff can still perform, considering his or her residual functional capacity, age, education and work experience. See 20 C.F.R § 404.1520 (a)(i)-(v).

1 additional limitations “we’d find no jobs such a person could do who was so  
2 restricted.”(AR 50).

3 In the Decision, the ALJ determined that, with respect to plaintiff’s  
4 residual functional capacity, plaintiff “was not able to communicate in English,  
5 and is considered in the same way as an individual who is illiterate in English.”  
6 (AR 29). Relying on the VE’s testimony following the *initial* hypothetical  
7 question (where the person *was* able to “communicate in English”), the ALJ  
8 determined there were jobs in the national economy that plaintiff could perform,  
9 specifically, fast food worker, laundry worker, bench hand assembler of small  
10 parts, and escort vehicle driver. (AR 29).

11 Here, the ALJ’s initial hypothetical question to the VE was  
12 incomprehensible because it did not clearly take into account plaintiff’s lack of  
13 ability to communicate in English, as found by the ALJ. See Embrey v. Bowen,  
14 849 F.2d 418, 422 (9th Cir. 1988) (“Hypothetical questions posed to the  
15 vocational expert must set out all limitation and restrictions of the particular  
16 claimant....”); Gamer v. Secretary of Health and Human Services, 815 F.2d  
17 1275, 1279-80 (9th Cir. 1987).

18 Although defendant admits the ALJ erred in his hypothetical question to  
19 the VE, defendant contends the error was harmless because the VE during cross-  
20 examination did not focus on plaintiff’s English language limitations when  
21 testifying about plaintiff’s ability to perform the laundry worker job. However,  
22 as noted above, the ALJ ignored the VE’s testimony during cross-examination in  
23 making the determination about the jobs available to plaintiff in the national  
24 economy. It is clear to the Court that the VE actually considered plaintiff’s lack  
25 of ability to communicate in English when he testified about the jobs available to  
26 plaintiff in the national economy. Therefore, the ALJ’s error was not harmless.  
27 See Molina v. Astrue, 674 F.3d 1104, 1117 (9th Cir. 2012)(holding that an error  
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1 cannot be deemed harmless if it is not “inconsequential to the ultimate  
2 nondisability determination.”).

3 **ORDER**

4 For the foregoing reasons, the Decision of the Commissioner is reversed,  
5 and the matter is remanded for further proceedings in accordance with this  
6 Decision, pursuant to Sentence 4 of 42 U.S.C §405(g). The hypothetical  
7 question to the vocational expert should reflect plaintiff’s language limitation.  
8 See Hill v. Astrue, 698 F.3d 1153, 1162 (9th Cir. 2012)(“Because the overall  
9 record shows these additional assumptions should have been incorporated into  
10 the ALJ’s hypothetical, remand is appropriate.”)

11 Dated: June 18, 2014

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STEPHEN J. HILLMAN  
United States Magistrate Judge